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December 28, 1987

Mr. Theodore E. Williams, Director
Arizona Department of Health Services
State Health Building
1740 West Adams Street
Phoenix, Arizona 85007

Re: I87-164 (R86-112)

Dear Mr. Williams:

Your predecessor has asked whether, in view of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 to -1557, as amended by the Airline Deregulation Act of 1978, the Department of Health Services has authority to regulate air ambulance services pursuant to A.R.S. §§ 36-2201 to -2244. With regard to economic regulation under the certificate-of-necessity statutes, A.R.S. §§ 36-2232 to -2244, the answer is no. With regard to essential public health and safety matters, A.R.S. §§ 36-2201 to -2231, the answer is yes.[1]

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[1] A.R.S. § 36-2213(2)(b) exempts out-of-state ambulances bringing a patient into Arizona from licensing and registration requirements, but precludes an out-of-state ambulance from intrastate transportation of patients without an Arizona ambulance license unless assisting in response to a major catastrophe or emergency if state licensed ambulances are insufficient. See A.R.S. § 36-2212 (licensing) and A.R.S. § 36-2231 (registration). A.R.S. § 36-2217(B) exempts air ambulances engaged in transportation of sick or injured people in a noncritical or nonemergency situation as determined by a physician from all regulation under A.R.S. §§ 36-2201 to -2244.

The issue is whether federal law has preempted Arizona from regulating air ambulances. The first inquiry is, has Congress expressly preempted the state from acting.

Section 1305(a)(1), United States Code, provides:

> [N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

This provision prohibits states from regulating in areas formerly within the Civil Aeronautic Board's ("CAB") jurisdiction.[2/] See generally 49 U.S.C. §§ 1371 and 1386(b)(1). Air ambulances are air taxis which may be exempt from requirements of subchapter IV of the Federal Aviation Act, codified at 49 U.S.C. §§ 1371 to 1389. See also 14 C.F.R. Part 298. Section 1305(a)(1) preempts states from regulating the intrastate activities of any carrier exempted pursuant to subchapter IV. Hughes Air Corp. v. Public Utilities Commission,

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2/It does not apply to the health and safety jurisdiction of the Federal Aviation Administration ("FAA"). Regulatory responsibilities over air transportation originally were divided between the CAB and the FAA. The CAB regulated economic matters, including rate and route decisions. The FAA had primary responsibility for safety and health matters. See Delta Air Lines, Inc. v. C.A.B., 543 F.2d 247, 259-260 (D.C. Cir. 1976). The Airline Deregulation Act of 1978 terminated the CAB and transferred its remaining regulatory authority to the Department of Transportation. Pub. L. 95-540, § 40(a), Oct. 24, 1978, 92 Stat. 1744 (effective January 1, 1985).

644 F.2d 1334, 1337-1339 (9th Cir. 1981).3/ Thus, Congress has expressly preempted Arizona from regulating air ambulances with regard to rates, routes, or services, i.e., the economic regulation under the certificate-of-necessity statutes, A.R.S. §§ 36-2232 to -2244.

The second inquiry, relevant to the health and safety jurisdiction of the FAA, is whether Congress has preempted state regulation by implication.4/ The threshold question is whether in passing the federal aviation legislation Congress intended to occupy the field of medical health and safety regulation of air ambulance services. See Chevron U.S.A., Inc., v. Hammond, 726 F.2d 483, 486 (9th Cir. 1984). Examination of six factors informs the determination of congressional intent: (1) the comprehensiveness of federal regulations; (2)

3/Hughes Air Corp. also held that the Tenth Amendment did not bar Congress' preemption of the state regulation at issue in that case. The court indicated that the question of Congress' power to preempt had been decided on a case-by-case basis. 644 F.2d at 1341. National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), affected this portion of the Hughes Air Corp. decision. It held that, where the subject regulated was such an integral and important aspect of state life that the federal government's preemption of the state regulation interfered with the state's sovereignty guaranteed by the Tenth Amendment, Congress lacked the power to preempt. 426 U.S. at 852, 96 S.Ct. at 2474, 49 L.Ed.2d at 257-258. The court also indicated that public health was such a basic and traditional state function as to be protected by the Tenth Amendment. Id. at 851-152, 96 S.Ct. at 2474, 49 L.Ed.2d at 274-249. Thus, under National League of Cities arguably Congress lacked power to preempt Arizona air ambulance regulation. National League of Cities has been overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 531, 105 S.Ct. 1005, 1007, 83 L.Ed.2d 1016, 1021 (1985). There remains no question that Congress had the power to preempt the state from ambulance regulation.

4/The Federal Aviation Act of 1958, as amended, does not expressly preempt state regulation in health and safety areas.

consideration of state police power; (3) congressional intent that there be collaborative federal/state efforts to protect the health and safety of patients being transported by air ambulances; (4) the need for uniform regulation; (5) the history of regulation of the subject matter; and (6) available legislative history. See id.

With regard to the essential health and safety legislation involving ambulance services,[5] although the FAA has promulgated numerous aviation safety rules, only one deals with medical needs of passengers.[6] Promulgation of one regulation is not comprehensive regulation. With regard to the other criteria for determining congressional intent to occupy the field, the Federal Aviation Act of 1958, as amended, does not speak to emergency medical services; neither does the legislative history indicate a concern for regulation of ambulance services. See generally 1958 U.S. Code Cong. & Ad. News 3741, et seq.; 1978 U.S. Cong. & Ad. News 3737, et seq. Additionally, legislation for essential medical health and safety purposes is an obvious use of the police power which inheres in the state.[7] Thus, using the criteria set

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[5] In 1982 the legislature responded to the 1980 publicly mandated deregulation of motor carriers, including ambulance services, by enacting legislation regulating ambulance services with respect to essential public health and safety matters only. Laws 1982 (2nd Reg. Sess.) Ch. 130, § 1. This legislation is codified throughout A.R.S. §§ 36-2201 to -2231.

[6] The equipment for dispensing medical oxygen is regulated by 14 C.F.R. § 135.91 In 1977 the FAA issued advanced Notice of Proposed Rulemaking on Air Ambulance Service, setting safety standards for operators. 42 Fed.Reg. 37825, July 25, 1977. The proposed rule was withdrawn. 43 Fed.Reg. 36461, August 17, 1978.

[7] The beginning proposition when examining congressional intent to preempt is that the historic police powers of the states are not to be superseded by federal legislation unless that was the clear and manifest purpose of Congress. Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed 1447, 1459 (1947).

forth above to determine congressional intent to occupy the field of air ambulance patient health and safety, no such intent can be found.

Even though Congress did not intend to foreclose all state legislation in this field, the question of whether A.R.S. §§ 36-2201 to -2231 conflict with the Federal Aviation Act and concommitant regulations must be addressed before concluding that federal preemption does not apply. See Chevron U.S.A, 726 F.2d at 486, 495. The test is whether the state law stands as and obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67-68, 61 S.Ct. 399, 404, 85 L.Ed. 581, 587 (1941). As A.R.S. §§ 36-2201 to -2231 regulate transport of sick, injured, wounded or otherwise incapacitated or helpless individuals by air ambulance only in critical or emergency situations and only with regard to essential medical health and safety aspects of such transport,[8] whereas the FAA statutes and regulations are concerned with safe operation of aircraft, not the medical care of passengers, A.R.S. §§ 36-2201 to -2231 do not conflict with the Federal Aviation Act, but are entirely compatible with and complementary to the federal purpose.

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[8] A.A.C. R9-13-1001, R9-13-1003, R9-13-1101, R9-13-1102 and R9-13-1104 require air ambulances to apply for a license showing proof of liability and malpractice insurance, list medical personnel, submit ambulance and medical equipment for inspection, have a medical control plan, meet certain cleanliness and staffing requirements and register ambulances which meet certain design criteria. Although R9-13-1003(A) specifies that all air ambulances shall have pilots and mechanics who meet minimum qualifications having to do with aircraft safety and R9-13-1102 and R9-13-1104 require air ambulances to meet certain lighting, navigational and communication equipment requirements, these requirements reflect the same goal that Congress and the FAA had in mind in enacting laws and regulations regarding safe aircraft operation. They do not conflict. See State v. Collins, 480 N.E.2d 1132, 1135-1136 (Ohio App. 1984) (held: state law prohibiting operation of aircraft without valid U.S. license was valid exercise of police power, not contrary to the purpose of or in conflict with federal law).

Because the air ambulances subject to state regulation are interstate carriers, the question of whether A.R.S. §§ 36-2201 to -2231 impose an undue burden on interstate commerce must also be answered. The test is:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Grand Canyon Dories, Inc., v. Idaho Outfitters and Guides Board, 709 F.2d 1250, 1256 (9th Cir. 1983), quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970) (citation omitted). The Arizona statutes promote medically safe treatment of individuals who must be transported in ambulances. The statutes and rules promulgated thereunder apply equally to protect residents and nonresidents alike and the license, registration and fee provisions, A.R.S. §§ 36-2212 to -2231, are identical for resident and nonresident ambulance services. See 709 F.2d at 1256. The minimal burden which the Arizona statutes and rules impose on interstate commerce is more than offset by the benefits to its citizens, tourists and other visitors of having available, medically safe transport should they need an air ambulance. See id. at 1257.

Thus, we conclude that the Department of Health Services has authority to regulate air ambulance services with regard to essential public health and safety matters, A.R.S. §§ 36-2201 to -2231, but is preempted from regulating with

regard to economic regulation under the certificate-of-necessity statutes, A.R.S. §§ 36-2232 to -2244.9/

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:SSS:pcd

9/The Minnesota Supreme Court has recently reached the same conclusion with respect to Minnesota's ambulance service statutes. Hiawatha Aviation of Rochester, Inc. v. Minnesota Department of Health, 389 N.W.2d 507, 508, 509 (1986).